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Supreme Court, U.S.
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Nos. 24, 110, 111, 439, and 494

In the Supreme Court of the United States

OCTOBER TERM, 1935

NANCY K. McFEELY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FRANCES G. LEE

RUFUS R. RAND, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ISABEL K. DIBBLEE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE THIRD, FIRST, EIGHTH, AND NINTH CIRCUITS

PETITION FOR A REHEARING

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 24

NANCY K. MCFEELY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 110

UNITED STATES OF AMERICA, PETITIONER

v.

FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES

No. 111

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

FRANCES G. LEE

No. 439

RUFUS R. RAND, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 494

ISABEL K. DIBBLEE, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE THIRD, FIRST, EIGHTH, AND NINTH CIRCUITS

34466—35

PETITION FOR A REHEARING

Comes now the Solicitor General, on behalf of the United States and the Commissioner of Internal Revenue, and respectfully prays that the judgments heretofore entered in these causes be vacated, that the mandates thereon be stayed, and that a rehearing of these causes be granted.

These causes were argued together, the question involved being common to all, during the present term of Court at the session of the Court held October 24, 1935. The question involved is whether personal property acquired from a decedent through intestacy or a general bequest is held, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, from the date of the decedent's death or from the date of distribution. On November 11, 1935, this Court handed down its opinion holding that in such cases the property is held from the date of the decedent's death. Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo dissented.

We respectfully submit that the conclusion of the Court in these cases is erroneous, is inconsistent with the plain intent and purpose of the statute and cannot be reconciled with this Court's decision in *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455. In referring to the *N. Y. Trust Co.* case as not being authority here, the Court was in error in stating the inconsistency in the statutory provisions there involved and, we believe, failed to recognize the

essential basis of that decision. The Court, rejecting our contention that the *N. Y. Trust Co.* decision requires the reading of Section 101 (c) (8) and Section 113 (a) (5) together, said that the Revenue Act of 1921, involved in the *N. Y. Trust Co.* case—

> exhibited an inconsistency *in that while a donee was permitted to tack his tenure to that of his donor, he was not permitted to use his donor's basis.* (Italics supplied.)

The Revenue Act of 1921 *required* the donee of property acquired by gift after December 31, 1920, to compute his gain on a sale thereof upon *the donor's basis* (Section 202 (a) (2)) but did not in terms authorize the donee to include the donor's tenure in reckoning the period of his holding under the provisions granting the special rate of tax on capital gains. Section 206 (a) (6). This Court held, in the *N. Y. Trust Co.* case, that the two sections if read separately and without regard each to the other rendered the Act inconsistent, in that the amount of gain taxed to the donee accrued over a period of more than two years and yet would not be allowed the preferential rate of tax intended by Congress to be applied to such gains. The impelling consideration for allowing the special rate was that the gain had been earned or accrued over a series of years, not merely that the gain was large, and Congress fixed a term of more than two years as the period during which the gain must

have accumulated to entitle the taxpayer to the preferential rate. It was so argued by the taxpayer in the *N. Y. Trust Co.* case (p. 459) and this Court there recognized that Congress so intended (p. 467).

In the instant cases, as in the *N. Y. Trust Co.* case, the section prescribing the basis for determining the amount of gain and the section authorizing the special rate of tax (Revenue Act of 1928, Sections 101 (c) (8) and 113 (a) (5)) are applicable to different elements of the same or like transactions and should not be regarded as unrelated. It is essential in these cases, as it was in the *N. Y. Trust Co.* case, that the two sections be read together if the very policy and purpose of the capital gains provisions are to be effected. Under the ruling handed down in these cases the taxpayers are given the benefit of the preferential tax rate upon a gain which was earned and accrued during a period of less than two years, whereas Congress clearly intended that the reduced rate should be available only as to gains accumulated over a period of more than two years. Thus, the construction approved by the Court in these cases injects into the statute the very inconsistency which was removed by the *N. Y. Trust Co.* decision from the statute there involved.

This construction of the Act does not require a departure from the literal meaning of Section 101 (c) (8) and does not in anywise penalize these

taxpayers. That section defines capital assets as property *held* for more than two years, but does not undertake to define the term "held" or otherwise independently mark the commencement of the period. This Court has recognized that the definition standing alone, while superficially clear, is ambiguous and requires interpretation. *Helvering* v. *N. Y. Trust Co., supra.*

Moreover, under the Acts prior to the 1928 Act, as interpreted and administered, the date specified as fixing the base likewise established the rate. Accordingly, if Congress must be deemed to have enacted the Revenue Act of 1928 with knowledge of the administrative construction and application of the earlier Acts it must have intended that the date for base should continue also to fix the rate and accordingly when the date for base was changed to the date of distribution it was unnecessary to alter the general definition of capital assets. Wherever Congress has fixed a base different from date of acquisition, there has been no doubt of the latter and the variance is founded in sound reason. The date of distribution was fixed by the 1928 Act for the base of property received from a decedent as in these cases because of the doubt as to the proper date of acquisition and there is no sound reason for establishing base as of a date different from what Congress determined should be considered the date of acquisition.

Adherence to the principle established in the *N. Y. Trust Co.* case, that the date for base also fixes the holding period for getting the rate, in nowise penalizes these taxpayers. The preferential capital gain rate was designed to relieve those taxpayers bearing the burden of the tax on gains accumulated over a period of more than two years, *and to no others.* These taxpayers are taxable only upon the gain accrued since the date of distribution, a period of less than two years. If the statute is construed as in the opinion rendered in these cases, then the two-year period fixed by Congress as the minimum for accumulation of gains entitled to the preferential rate is nullified where the property was received from a decedent by intestacy or general bequest.

The rule that taxing statutes, if of doubtful intent, are to be construed favorably to the taxpayer should not be applied in these cases. The provision of the statute here involved is one granting a preferential rate of tax, a partial exemption from the normal or full rate of taxation. The applicable rule in such cases is that all doubts must be resolved *against the taxpayer. Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235. In the *N. Y. Trust Co.* case, Mr. Justice Roberts, dissenting, pointed out that this is the rule applicable in construing the capital gains provisions of the revenue acts. The majority opinion in the *N. Y. Trust Co.* case does not deny the application of this rule or invoke the

rule of liberal construction in favor of the taxpayer, but rather construes the statute to effect the clear intent and purpose of Congress and relies only on the rule that a statute should not be expounded strictly according to the letter without regard to the manifest purpose and policy of the legislation.

For the foregoing reasons it is respectfully submitted that the present petition should be granted. It is also prayed that the mandates in these causes, and in *Kate A. Ogle* v. *Helvering, Commissioner,* 1935 Term, No. 137, which is to abide the decision in No. 439, be stayed pending disposition of this petition and until further order of this Court.

Copies of this petition have been served upon counsel for the taxpayers.

STANLEY REED,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

DECEMBER, 1935.

CERTIFICATE

I certify that this petition is presented in good faith and not for delay.

STANLEY REED,
Solicitor General.

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